

UNITED STATES OF AMERICA

$$V.$$

SALIM AHMED HAMDAN

DEFENSE MOTION FOR  
ABATEMENT BASED ON  
IMPROPERLY CONSTITUTED PANEL

1. Timeliness. This motion is filed in a timely manner based on decision of the Appointing Authority on 19 October 2004.
2. Relief sought. The Defense requests that the Military Commission abate proceedings as a matter of law until such time as the Military Commission is constituted in accordance with Military Commission Order Number 1.
3. Overview. The current composition of only three members with no alternate member identified does not comply with the mandatory language of Military Commission Order Number 1 and as such cannot proceed in the present case until the Appointing Authority nominates sufficient members to bring the panel in compliance with the Order's plain language. That Order mandates that "in case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member." The failure to replace members removed by the Appointing Authority not only violates the Commission's own rules, it also impermissibly forces a Hobbesian choice upon Mr. Hamdan, wherein he is either required to accept the members without challenge or suffer prejudice due to reduced numbers. It also vitiates the entire point of voir dire, because it penalizes Mr. Hamdan for making challenges to the panel. Without such challenges, Mr. Hamdan could only have been found guilty upon a decision by 80% of the members (4 out of 5). Now, he can be found guilty upon a 66.67% percent vote of the members (2 out of 3). Such a bizarre voting rule, whereby a defendant is hurt for raising challenges to the propriety of particular members, is inconsistent with basic principles of fair play, as well as Military Order No. 1.
4. Facts
  - a. During initial proceedings in the above-styled case on 24 August 2004, the Defense challenged certain members of the commission panel. The commission panel began with six members, five voting and one alternate. After conducting voir dire, the Defense challenged for cause all but one voting member and the alternate member. These challenges were based on meaningful, factual basis, not superficial concerns.
  - b. The Prosecution initially objected to all the Defense challenges for cause, and raised no challenges for cause. In a subsequent brief filed by the Chief Prosecutor, the Government withdrew its objections on three of the five members challenged by the Defense.

c. On 19 October 2004, the Appointing Authority granted three challenges for cause, including the alternate member. The Appointing Authority did not appoint substitute members or an alternate member(s).

5. Law supporting.

Paragraph 4.A.(1) of Military Commission Order No. 1, places responsibility for the appointment of members to the Military Commission on the Appointing Authority, stating:

“The Appointing Authority shall appoint members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.”

Paragraph 4.A.(2), allows the Appointing Authority discretion in determining the number of members to hear a Commission, stating:

“Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.”

Taken together, these two paragraphs permit the Appointing Authority at the onset to determine the number of members to hear a particular case, to appoint members he believes to be qualified and to where necessary substitute for members removed from trial. The Appointing authority may very well have selected three members at the outset of this trial, plus alternates. But to select five, and then have the group whittled down to three (with no alternates) is to create a system in which challenges to the membership of the panel are radically disfavored and boomerang to hurt the defense.

In any event, the Appointing Authority’s action after trial by Military Commission had commenced in Mr. Hamdan’s case exceeded his authority. The plain language dictates that members, when removed, are replaced by alternate members, thus preventing a change in the overall composition of the Commission based on a challenge by either side or other incapacity of a member. The language is mandatory. The Appointing Authority is permitted to add additional members to fill any vacancy among the members or alternate members, occurring after trial. Taken at its plain language, when a member is challenged, an alternate member is to take his place, necessitating the Appointing Authority appointing a new alternate member. In the case of multiple vacancies, the Appointing Authority would be required to appoint members until such time as the panel returned to its original composition and had at least one alternate member. The Order permits proceedings to happen without the alternate member present, but it most emphatically does not permit the Appointing Authority to fail to appoint an alternate (as

evidenced by the mandatory “shall”) *nor* does it permit the Appointing Authority to drop the number of voting members after challenges are made.

To read paragraph 4.A. otherwise, creates for Mr. Hamdan the Hobbesian choice of exercising a challenge to his detriment. In Mr. Hamdan’s case, five members were initially detailed. Five members required that the government obtain the concurrence of two-thirds of the members for a verdict of guilty or a vote of guilty by four members. Reduction of this panel by challenge presents the situation where Mr. Hamdan is forced to elect to have the member sit or have the government’s burden correspondingly reduced. For four members, the government would be required to obtain the concurrence of three members and for three members; the government’s burden is further reduced to only two members. In essence, Mr. Hamdan is forced to elect between a member who is unsuited or allowing the member to sit in order to force the government to obtain the member’s concurrence.

While military court-martial may be reduced in number so long as they do not fall below the mandated quorum, such rules are by the President’s Military Order, inapplicable to trial by Military Commission. Furthermore, the very rules for courts martial would *require* the use of 5 members in a trial such as this, since a General court martial has at least five members and must be used when sentences of over one year are being considered. To boot, courts martial include full and vibrant preemptory challenges for both trial and defense. And in a case like the one here, where the commission sits as the judge of both *law and fact*, the need for five members is even greater than it is in the court martial context, where a judge trained in law evaluates the legal arguments. As such, equity would dictate that any reliance on the ability to reduce members after the proceedings began in keeping with Rules for Court-martial also mandated protections contained therein.<sup>1</sup>

Paragraph 4.A.(1) clearly intended that Mr. Hamdan not be subject to such a dilemma by providing that an alternate would take the place of any member excused from the case and by mandating that an alternate be appointed to the Commission at all times. While paragraph 4.A.(1) does not require an alternate member to be present at all times, paragraph 4.A.(2) requires that a Commission shall be composed of one or two alternate members. The Appointing Authorities failure to appoint alternate members in the present Commission until the Commission returns to full strength and has an alternate member present violates the plain language and intention of Military Commission Order No. 1.

Independent of whether the Appointing Authority can *post hoc* reduce the number of members after a commission has commenced, the Appointing Authority has also violated the plain language of paragraph (2), which mandates the appointment of an alternate member. While such a member under paragraph (1) is not required to attend all sessions, there is no authority for the continuation of proceedings without an alternate identified. As such under no circumstances

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<sup>1</sup> It is of note that in its research the defense has been unable to find any occasion wherein the commission has been composed of as few as three members. See *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals Volumes 1-15*.

may the Commission as currently composed be found to be properly constituted in accordance with Military Commission Order No. 1.

5. Legal Authority Cited.

a. Military Commission Order (MCO) No. 1, paragraph 4.A.(2)

b. PMO, 13 Nov 01.

c. *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals Volumes 1-15.*

6. Oral argument: Is requested.

7. Witnesses: None.

8. Other: The Defense has not included the Appointing Authorities findings with regards to challenges for cause for Commission members in an effort not to prejudice the Commission members. The Presiding Officer excluded these members during challenges concerning their fitness and the Defense believes that it would be inappropriate to now forward the challenges to these members.

CHARLES D. SWIFT  
Lieutenant Commander, JAGC, US Navy  
Detailed Defense Counsel  
Office of Military Commissions

Neal Katyal  
Civilian Defense Counsel